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WM. R. STAN

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 575.

COMMERCIAL TRUST COMPANY OF NEW JERSEY,
Appellant,

vs.

THOMAS W. MILLER, as Alien Property Custodian,
Appellee.

BRIEF FOR APPELLANT.

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Statement of the Case.

(References in this brief to the record are to the side-paging.)

This is an appeal from a decree of the Circuit Court of Appeals of the Third Circuit, entered August 1st, 1922, affirming a decree of the District Court for the District of New Jersey, entered January 19th, 1922, directing conveyance, transfer, assignment, delivery and payment by this appellant to the Alien Property Custodian of all the money and property held by it under an agreement set forth in the petition, to the terms of which we shall call attention in a moment. The property, so ordered transferred, is listed in the schedule shown on pages 117 and 118 of the record, and consists of $102,580.64 in

cash, and $450,000 of American bonds (or stock of the City of New York), $53,000 of the bonds being Liberty Loan Bonds, the others being municipal or corporate bonds.

These decrees were entered in a proceeding in equity instituted by the Custodian by petition in Sepember, 1920, which sought, expressly in the alternative, that the appellant be required to transfer and convey the property to the Custodian, or to show cause, if any there be, why this should not be done.

The situation which gave rise to the proceeding was as follows: In January, 1913, there were deposited with this appellant the above mentioned securities, or other securities which had become changed into these, under an agreement reading as follows:

> "Received, Jersey City, January 30th, 1913, for the account of Frederick Wesche, of Paris, France, and Helene J. v. Schierholz, of Plaue, Thuringen, Germany, the bonds particularly set out in the schedule or list hereto annexed, and having a par value of five hundred and twenty-four thousand dollars ($524,000) to be held for the joint account of the said Frederick Wesche and Helene J. v. Schierholz, and to collect the interest to become due and payable on said bonds for the joint account of the said Frederick Wesche and Helene J. v. Schierholz and to deliver over said bonds from time to time as requested, to the said Frederick Wesche, or to the said Helene J. v. Schierholz, or to the survivor of them, it being understood that the said bonds and the said interest money to be collected thereon are to be held and collected and delivered or paid over to either

the said Frederick Wesche or to the said Helene J. v. Schierholz, or to the survivor of them. Upon all interest moneys collected on said bonds there is to be retained by the undersigned for its services in the premises 2% of the amount so collected; this receipt is executed in triplicate.

COMMERCIAL TRUST COMPANY OF
NEW JERSEY,
By J. W. HARDENBERGH,
President.

Attest:
(Seal) WM. J. FIELD,
Secretary.

The deposit of the bonds with the Commercial Trust Company of New Jersey and the terms upon which said Trust Company is to hold and deliver over the said bonds and to collect and pay over the interest thereon as set forth in the above receipt is hereby ratified and confirmed.

Dated February , 1913.

FR. WESCHE,
HELENE J. V. SCHIERHOLZ."
(Record, pp. 17-18.)*

Shortly after the passage of the Trading With the Enemy Act, in December, 1917, this appellant reported to the Custodian that it held this fund which it had received on deposit under this contract; that the enemy interested in this fund was Helene J. v. Schierholz, whose address was Schloss Plaue, Thuringen, Germany, whose nationality it did not then know; and that another

*NOTE. References to the record throughout this brief are to side-pages.

person, not an enemy, interested in the property, was Frederick Wesche, whose last known address was 130 Faubourg (Street) St. Denis, Paris, France (Record, pp. 16-17). This appellant further reported that so far as it knew said Helene J. v. Schierholz and Frederick Wesche were the sole beneficiaries under that agreement (Record, p. 19). The cash at that time amounted to but $4,700, but was increased later through payment of some of the securities and collections of coupons. The appellant also reported by letter on June 14th, 1918, that, so far as it knew, Frederick Wesche was a resident of Paris, France, and not an enemy or ally of enemy (Record, p. 144).

The Custodian took no steps in regard to this fund until the 19th day of June, 1918, when a demand was prepared purporting to bear the signature of A. Mitchell Palmer, the then Custodian, which demand was served on this appellant on July 8th, 1918 (Record, pp. 5-6).

This demand covered *all* of the property deposited under the agreement above set forth, and not merely such portion of it as belonged to Mrs. v. Schierholz. It was made without any prior investigation of the facts on the part of the Custodian, beyond the receipt of the report and letter already mentioned from this appellant (Record, p. 196). It is one contention of the appellant that under the law as laid down by this Court over a hundred years ago, and under modern decisions in New York and New Jersey, the facts disclosed in the report and by the letter (to be found respectively in the record at pp. 10-27 and 193-195), did not in any way justify any determination that this was *all* enemy property, or

seizure of *all* the property as such; but rather required investigation and inquiry by the Custodian into the extent of the interests of Mrs. v. Schierholz, whom he declared to be an enemy; which investigation he never made until the facts were presented to him upon the hearing by the answer of this appellant to his petition that it be required to show cause. He then admitted that only a minor and separate identified part of this property, being about one-third of it, belonged to Mrs. v. Schierholz (Record, pp. 65-66, 68-69 and 198).

At the time of the making of this demand by the Custodian, the Trading With the Enemy Act forbade any review by any court of any seizure by the Alien Property Custodian, save only in the District Court of the United States for the district in which the claimant resided. The provision for alternative suit in the Supreme Court of the District of Columbia was not added until July 11th, 1919, a year later. Mr. Wesche thus had no recourse to any court for review of any such seizure, being a non-resident, neither an enemy nor ally of an enemy. The Custodian expressly admitted that Wesche was not an enemy and that they had never said he was (Record, p. 196). And Mr. Ahrenfeldt stood in like case.

It is believed, in accordance with the doctrines laid down by the Circuit Court of Appeals for the Second Circuit in the case of *Garvan* v. *$20,000 Bonds*, 265 Fed. 477 (subsequently affirmed here and reported as *Central Trust Company* v. *Garvan*, 254 U. S. 554), that seizure of the property of one not an enemy or ally of enemy, to whom *all* opportunity of court review was forbidden, was unconstitutional and without due process of

law; and that, consequently, surrender of the property by the appellant under such circumstances, to the Custodian, would have afforded it no defense to a claim by Mr. Wesche for such part of the property as belonged to him. The appellant accordingly did not transfer or deliver the property as so demanded, and still retains it under *supersedeas* bond.

On March 28, 1918, the appellant further reported to the Custodian by telegraph "that it held for the benefit of the said *cestuis que trust*" some $57,000 additional (Record, p. 5). This sum, as it subsequently appeared, was partly the proceeds of collection of maturing securities previously reported and partly collection of coupons (Record, pp. 64-67). Upon this telegraphic report the then Custodian, Mr. Garvan, without making any further investigation, caused a second demand to be made on the Commercial Trust Company of New Jersey on April 17th, 1919 (Record, p. 67).

This demand was again of the *entire* property as property of Mrs. v. Schierholz, and had no further basis than the previous report and letter, and the telegraphic report so made by this appellant; none of which indicated that Mrs. v. Schierholz was the owner of the entire property, and each of which showed clearly that part at least of the property belonged to Mr. Wesche. The Statute still remained in the same condition at this time, and the Trust Company would still have been as defenseless against any demand by Mr. Wesche for his part of the property as at the time of the previous demand. It again did not surrender the property.

The Custodian took no further step until September, 1920.

Meantime, early in July, 1920, Mr. Wesche demanded delivery and transfer of the property to him (Record, p. 74), which the Company refused, owing to the situation.

Two months later, on September 11th, 1920, the Custodian, Mr. Garvan, filed his petition in equity in the District Court of the District of New Jersey, to the precise nature of which we call attention.

After alleging the official capacity of Mr. Garvan and his succession to Mr. Palmer, and the incorporation of the appellant, the Custodian alleged (Paragraph III) that the appellant had made the report of December, 1917, of which he annexed a copy to his petition; and in Paragraph IV alleged the supplementary telegraphic report above mentioned. In Paragraph V he alleges directly and specifically that Mr. Palmer, as Alien Property Custodian, on or about June 19th, 1918, "after investigation determined that the said Helene J. v. Schierholz of Thuringen, Germany, was an enemy within the purview and meaning of the said Act," and that thereafter a demand, of which he annexed an alleged copy, was served on the appellant on July 8th, 1918 (Record, pp. 3-6).

This latter allegation of the petition is peculiarly noticeable in this particular, that the petitioner was careful to allege directly and in terms that Mr. Palmer had after investigation determined that Mrs. v. Schierholz was an enemy, but wholly omitted to allege that he had either investigated or determined the ownership of the property (Record, pp. 5-6).

It is true that the alleged copy of the demand annexed to the complaint contains the statement that the Custodian does after investigation determine that Mrs. v. Schierholz was an enemy and that the property was hers. But annexing a paper containing a statement, with an allegation that it had been served, was long since held by this Court not to be an allegation of the facts stated therein. It might well be true that the former Custodian had *said*, on a printed form, that he had done thus and so, and wholly untrue that he *had* done so. Even had Mr. Ahern, who verified the petition of the Custodian, had personal knowledge that no investigation of the ownership had been made, and no determination thereof by the Custodian, he could not have been held for perjury on this allegation. It was, in any event, not a showing of "probable cause supported by oath or affirmation."

In Paragraph VI of his petition, the Custodian alleged that he had made a second demand of all the property on April 17th, 1919, and this time omitted any allegation that he either investigated or determined, either the status of Mrs. v. Schierholz or the ownership of the property. The demand served, of which an alleged copy is annexed to the petition, however, contained the statement that the Custodian after examination did determine both the enemy status of Mrs. v. Schierholz and that the property was hers (Record, side pp. 6-7). That the demands, either of them, so read, was put in issue, and the Custodian offered no proof of their contents, and admitted that they were not correct copies (Record, p. 198).

In Paragraph VII of his petition, the Custodian asserted the legal conclusion that he was

vested with *all* the beneficial interests in the fund and that this appellant had refused to convey, transfer and deliver the property to him (Record, p. 7). That he was so vested was denied (p. 52).

In Paragraph VIII of the petition, he alleged that his proceeding was instituted "pursuant to the provisions of Section 24 of the Judicial Code of the United States by which the District Courts of the United States have original jurisdiction over all suits of a civil nature at common law or at equity, brought by the United States or any officer thereof, and under Section 17" of the Trading With the Enemy Act (Record, pp. 7-8). This was admitted (p. 52).

The prayer of the petition is peculiarly noticeable. It reads:

> "Your Petitioner prays that this Court issue a rule, directed to the said respondent (this appellant) commanding it, *in the alternative*, to convey, transfer, assign, deliver and/or pay to your petitioner, as Alien Property Custodian, the said money and other property hereinbefore described, with interest thereon accrued; *or else*, upon a day and at a place to be named in said writ to *show cause if any there be*, why the relief herein prayed should not be granted, and for such further relief as in the premises may seem meet and just." (Record, p. 8).

The petition was neither signed nor verified by the Custodian, but by Mr. Ahern, who verifies it as "the duly appointed, qualified and acting Managing Director *at* the office of the Alien Property Custodian" (Record, pp. 8-9).

This petition was filed on September 11th, 1920, and on it an order to show cause was issued commanding that this appellant

"do forthwith convey, transfer, assign, deliver and/or pay to Francis P. Garvan, as Alien Property Custodian, *all* the money and other property described and set forth in the petition annexed hereto, or appear in this Court at the place of holding said Court at Newark, on October 4th, 1920, and on or before the 20th day after service of this order, then and there, *by answer duly verified to show cause, if any there be, why it should not be required, by order of this Court, so to do,* and why the petitioner should not have such other and further relief as in the premises he may be justly entitled to." (Record, pp. 1-2).

The proceeding was expressly brought in equity (Record, pp. 1-3), and had for a sub-title "In the Matter of the Application of Francis P. Garvan, as Alien Property Custodian in re *Certain Stocks, Bonds, Securities and Money held by the Respondent as the Money and Property of Helene J. v. Schierholz of Thuringen, Germany, an enemy*" (Record, pp. 1-3).

The bulk of the property ordered transferred was *not* so held.

The proceeding thus lacked all of the special characteristics of the proceedings which were considered by this Court in *Central Trust Company* v. *Garvan,* which were there held to be purely possessory proceedings. The differences are carefully pointed out in the brief on the associated appeal of Wesche, No. 292 of the October Term, 1922, under Point XI, 8, pages 79-82 of that brief.

On the 21st of February, 1921, the appellant filed its amended answer (Record, p. 270). Its contents are especially important because every statement therein contained was admitted, on the record to be true (Record, p. 198).

After admitting the making of its report of December, 1917, and of the telegraphic report of March 28th, 1919, and that demands were made by the respective Custodians in July, 1918 (Record, p. 44), and about March 28th, 1919 (Record, p. 49), and denying all other allegations of the Custodian, this appellant, which had in the meantime fully investigated the situation, showed just what the ownership of the property was (Record, pp. 59-70, Paragraphs XIV-XIX); that in January, 1913, it was Wesche who had deposited the securities, which grew into this fund, under the agreement above set forth (Record, p. 59); that the property was owned in severalty by four different people: a specific part by Wesche himself; a specific part by Charles J. Ahrenfeldt, an American citizen residing abroad throughout the war, in England, France and Switzerland, and not at any time since August 1st, 1914, resident within any judicial district of the United States (Record, p. 55); a specific jart by Mr. Ahrenfeldt's sister, Mrs. v. Uxküll-Gyllenband (Record, pp. 61-62, 66-67, 69); and a specific part, approximately one-third of the whole, by Mrs. v. Schierholz, another sister of Mr. Ahrenfeldt (Record, pp. 60-61, 65-66, 68-69). Each of these ladies was an American born woman who had lost her citizenship by marrying a German many years before the war (Record, pp. 50-51, 55, 57-58), and the property of each (included in the fund) had come to her, years before the war, by will from her father (Record, pp. 57-58), who was an American citizen (Record, p. 51), and not from any German source either directly or indirectly. A small portion of the securities owned by Mrs. v. Schierholz and a small portion

of the securities owned by Mrs. v. Uxküll-Gyllenband had been acquired by each of them by purchase with their own funds from their brother, Mr. Ahrenfeldt, in March, 1914. From that date the ownership had remained unchanged (Record, p. 62).

It will be noticed that at the time the Custodian's petition was filed in September, 1920, the Act providing for return to American women, who had married Germans and thereby lost their citizenship, of property of theirs seized by the Custodian, had already been passed. There was, however, question whether in its original form (which read, "by birth within the United States"), the Statute applied to either of these ladies, who were each born in Paris, one in 1856 and the other in 1861 (Record, pp. 50, 55). This was, however, covered, before the case was submitted to the District Court, by the amendment of February 27th, 1921, modifying that Statute by making it applicable to the daughters of American citizens born abroad. The allegations of the answer brought these women unquestionably within the terms of the Act as amended February 27th, 1921.

The answer showed, further, that in January, 1913, all this property was being handled by Mr. Wesche, as owner of his own share and as agent for each of the other three (Record, p. 56); that at that time, as he was advancing in years, it was decided by the owners that it would be wiser to deposit these securities with this appellant and to make the deposit in the joint names of Wesche and Mrs. v. Schierholz, so that in case of the death or disability of Wesche there might be some one authorized to withdraw the

securities belonging to the others from the deposit (Record, pp. 56-57, 72-73). Mrs. v. Schierholz was, therefore, joined as a co-depositor in name, but was under express agreement with the other three not to take any part in the management of the securities, but to leave them entirely in Mr. Wesche's control, except only in case of his death or disability (Record, pp. 57-58, 72-73). Mrs. v. Schierholz at no time, from the inception of the deposit in January, 1913, interfered with the property in any way, and all orders, instructions and directions concerning it had been given exclusively by Wesche (Record, pp. 72-73). Mrs. v. Schierholz was thus, except as to her own specific bonds and cash, a mere alternate agent, and any demand by her of the securities of the others from the Trust Company would have been a breach of trust on her part (Record, pp. 73-74). It would seem, too, that any contractual power of hers to demand delivery of the securities from this appellant, especially as agent for the others, terminated, *ipso facto,* on the declaration of war by the United States on April 6th, 1917. As to all the property, except her separate, individual securities and cash, she was, in fact, merely an agent whose power had lapsed.

The answer set out with great particularity: the ownership of the deposit at the date of the first report, made in December, 1917, showing separate ownership and not ownership in common; also all changes that had occurred in the ownership after March 1st, 1914; and the ownership on October 1st, 1920, identifying the specific amounts of each kind of securities belonging to each one (Paragraphs XIV-XIX, Record, pp. 59-70).

The answer further set out (Record, p. 74) that Wesche had demanded delivery of the securities in July, 1920.

The appellant did not restrict itself to the failure of the Custodian to allege that either he or his predecessor had investigated and determined the ownership of the property, but specifically alleged that no investigation of the ownership of the property was made by either Custodian, and that the pretended determinations recited in the demands were not made by either Custodian personally, or after investigation, or even predicated upon or in accord with the information he did have (Record, pp. 45-48, 76-77).

The answer carefully showed that Wesche was not and never had been an enemy, or ally of an enemy, or resident within any judicial district of the United States (Record, pp. 70-72); and alleged directly that the demands were based exclusively on the reports so made by the appellant, and that the pretended determinations were in direct conflict with the only information that the Custodian possessed (Record, pp. 47-48). It alleged that a mere letter of inquiry to Wesche, sent to him at Paris, would have brought prompt and full information (Record, pp. 45-47); and that the recital of investigation of ownership in the demands was a mere pretense; that none had been made.

Upon the hearing the Custodian introduced in evidence the original report made by the appellant and a letter which its Secretary and Treasurer had written to the Custodian on June 4th, 1918, which, in substance, simply renewed the statement that Mrs. v. Schierholz was an enemy and that, as far as it knew, Wesche was not. Aside

from the submission of these two papers, the petitioner introduced no further evidence and rested (Record, pp. 191-195). He did not introduce in evidence either of the two demands of which alleged copies were annexed to the Custodian's petition, the correctness of which had been denied (Record, pp. 44, 49), so that the Custodian gave no evidence whatever that any determination had been made, by either himself or his predecessor, of the ownership of the property; and if the recital in the demands could be deemed allegations that the Custodians had made determinations, the allegations were denied and were entirely unsupported by any evidence. In fact, the truth of the denials was admitted (Record, p. 198).

After the Custodian rested, a colloquy ensued between counsel and the Court, in which counsel for the Custodian, the Assistant-Attorney General, specifically admitted that beyond what was shown by the papers introduced the Custodian made no investigation whatever (Record, pp. 196-197); that they had never questioned the fact that Wesche was not an enemy, and specifically admitted that Wesche was not an enemy, and that they had never said he was otherwise (Record, pp. 196-197). Finally, the Court turned to the Attorney General and said, "Upon filing these amended answers, the two answers standing, everything that you have not controverted by the introduction of these documents" (the report and the letter from the appellant), "you admit to be facts, but you contend upon these facts there is no legal answer to your claim?" To which the Assistant-Attorney General replied, "That is it." The Court, addressing the counsel for this appellant, then said, "So that everything you put in

your answer save what may be controverted by these documents is admitted as facts in the case." To which counsel for the appellant answered, "All right, sir." The Court then addressing the Assistant-Attorney General said, "That is where you stand," and he answered, "Yes, sir" (Record, p. 198). The appellant thereupon rested, the matter was argued and the Court directed that briefs be filed by the 15th of March, 1921, which was done on that date (Record, p. 199).

Between the argument and the submission of the briefs occurred the amendment of February 27th, 1921, establishing beyond peradventure the rights of these two ladies to have property of theirs, seized by the Custodian, returned, even "without application therefor."

Seven months passed before the District Court rendered its decision. In the meantime, on July 2nd, 1921, peace was declared by the Joint Resolution, which was signed by the President on that date. It was not until October 22nd, 1921 (Record, p. 271), that the Court filed its opinion directing decree ordering transfer of all the property to the Custodian, and at the same time filed a memorandum denying the respective petitions of Ahrenfeldt and Wesche to intervene (Record, pp. 202-212), decrees which are here on appeal by each of those petitioners for leave to intervene.

On November 11th, 1921, ratifications of the post-bellum treaty with Germany were exchanged, and on January 16th, 1922, the matter came on for further hearing on application for decrees. This appellant then urged that the Peace Resolution, the Treaty with Germany, and the Act of February 27th, 1921, had barred whatever rights

the Custodian might previously have had to seize this property. All these objections were overruled (Record, pp. 199-201); and the decrees denying leave to intervene were entered on January 16th, 1922, and final decree directing transfer and delivery of *all* the property by this appellant to the Custodian, was entered on January 19th, 1922 (Record, pp. 199-201).

This appellant thereupon appealed from such final decree to the Circuit Court of Appeals for the Third Circuit; on August 1st, 1922, that Court affirmed the decree of the District Court, filing an opinion which appears at pages 281-283 of the record on appeal. From its decree of affirmance, entered August 1st, 1922, this appellant has now appealed to this Court.

Upon appellant's filing *supersedeas* bond, first the District Court and then the Circuit Court of Appeals stayed the execution of the decree pending the appeal, this appellant undertaking to hold the fund intact (Record, p. 309).

Principal Questions Presented.

The principal questions presented on this appeal are briefly the following:

Whether, even in purely possessory proceedings instituted in the courts by the Custodian, there are not available defenses such as:

1. Failure of the Custodian to make a showing of facts constituting not mere suspicion, but "probable cause" to believe the property subject to seizure as enemy property.

2. Unconstitutionality of the Statute authorizing seizure, in its application to the particular case.

3. That the Custodian had failed to comply with the requirement of determination predicated upon prior investigation as called for by the Statute.

4. That if for any reason the demand were not itself a completed capture, it could not be completed by the Court on the strength of the Custodian's determination, but only on the strength of facts shown as probable cause.

5. That the capture, if for any reason not made complete by the mere demand, could not be completed after the declaration of peace.

6. That, whatever may be true of the Custodian, the Federal *Courts*, under the Fourth Amendment to the Constitution, may issue warrants or orders for seizure of property, *only* on

showing of facts constituting probable cause to believe the property enemy property subject to seizure, supported by oath or affirmation, and that determination by the Custodian on information acquired by him may not be substituted for determination by the Court, which is asked to issue the warrant, of the sufficiency of the facts shown to constitute probable cause.

Further questions presented are whether, in the case at bar, the Custodian failed to allege or to prove that he had made the reasonable investigation of the ownership of the property required by the statute and determined its ownership after and on the strength of such investigation; whether he failed to show any probable cause to believe the property enemy property subject to seizure, when he, on the contrary, admitted that only a small part of the property directed to be delivered to him belonged to Mrs. v. Schierholz, that a considerable part of the property belonged to Wesche personally, a considerable part to Ahrenfeldt, and neither of these was or ever had been an enemy.

Whether the demands at bar, so far as they affected property of either Wesche or Ahrenfeldt, who at the time of the demands were admittedly both non-residents of the United States, and neither of them enemies or allies of enemies, were unconstitutional and void because the Statute at the time each of the demands was made, forbade any judicial review of the seizure at the suit of either of them; and whether such demands, therefore, as to the property of either Wesche or Ahrenfeldt, could be considered completed captures in themselves.

Whether even joint property, belonging to an enemy and a neutral or citizen, is subject to capture in its entirety as enemy property, or only to the extent of the enemy's share; and whether showing a deposit in the joint names of a neutral and an enemy, with power to either, or to the survivor, to withdraw the property afforded a basis justifying determination that it was entirely enemy property, or merely established a case emphatically calling for further investigation under the statute, and for determination in accordance with the results thereof.

Whether the property of Mrs. v. Uxküll-Gyllenband, never demanded as such, was properly ordered delivered when it was admitted that it did not belong to Mrs. v. Schierholz, and that she had no real right thereto.

Whether the property of Mrs. v. Schierholz, whom the Custodian determined in 1918 to be an enemy and as whose he demanded all of the property, whether her own or belonging to the others, on its being admitted that she was an American-born woman, who had lost her citizenship by marrying a German many years before the war, and who, at the time of submission of the case to the District Court, was entitled on the admitted facts to immediate return of her own property under Sub-division b-3 of Section 9 of the Trading With the Enemy Act, as amended February 27th, 1921, even without making application therefor, could properly be ordered delivered thereafter by a Court of Equity.

Whether the fact that her name was joined with that of Wesche as co-depositor would justify the seizure of the portions of this fund belonging to the others.

Whether Mrs. v. Uxküll-Gyllenband's property should have been ordered delivered, when no demand for its delivery *as such* had ever been made and when she was entitled to immediate return of any of her property seized by the Custodian on the admitted facts of her being an American-born woman who lost her citizenship by marrying a German many years before the war (the property of both ladies having come to them from their father, an American citizen, and not from any enemy source.

Whether the right to possession of property is not itself property, and whether the bailee, on behalf of the owner, has not a right to object that the Court should not order transfer of the property to the Custodian without a due showing, supported by oath or affirmation, of probable cause to believe it enemy property subject to seizure, especially when the statute contains no provision for damages or interest for the period of detention, in the event that the seizure proves to have been improper and unjustifiable.

Whether either the Joint Resolution of July 2nd, 1921, or the treaty with Germany of August 25th, 1921, ratified November 11th, 1921, gave or reserved, or could constitutionally give or reserve any power to capture or hold, after the coming of peace, any property belonging either to Wesche, a neutral, or to Ahrenfeldt, an American citizen, neither of them ever enemies.

Whether those instruments gave or reserved any right of capture of the property of these two American-born ladies who were entitled to return of their property under the Act of February 27th, 1921.

Whether the admissions by the Custodian of the facts of ownership and status of the owners, prevented there being any probable cause shown for the issue of a warrant or order directing transfer, conveyance, delivery or payment of the property to the Custodian, and especially as to the separate property of Wesche and of Ahrenfeldt.

Whether any "probable cause" was shown for believing any of the property subject to seizure and particularly so as to the property of Wesche and of Ahrenfeldt, and whether the issue of a warrant or order for delivery of the property without such showing was in direct controvention of the provisions of the Fourth Amendment to the Constitution of the United States.

Specifications of Error.

The appellant specifies the following errors:

1. The Court erred in making the order and decree appealed from directing this respondent to forthwith account for, convey, transfer, assign, deliver and pay over to Thomas W. Miller, as Alien Property Custodian the money and other property described and set forth in the petition herein and in the amended answer, with any accretions thereon or changes therein.

2. The Court erred in making the order and decree appealed from for such order and decree is in conflict with the provisions of the Fourth and Fifth Amendments to the Constitution of the United States prohibiting unreasonable seizures and prohibiting deprivation of property without due process of law and prohibiting the taking of private property for public use without just compensation, and is not within the provisions of any rules authorized to be made by Congress concerning captures on land or water by the provisions of Section 7 of Article I of the Constitution of the United States.

3. The Court erred in overruling this respondent's objections to the demand, Exhibit B of the petition, that it turn over to the Custodian the property therein described.

4. The Court erred in overruling this respondent's objections to the demand, Exhibit C of the petition, that it turn over to the Custodian the property therein described.

5. The Court erred in holding that the statement in the demand, Exhibit B of the petition, that the Custodian Palmer had determined the ownership of the property in question after investigation, precluded inquiry in the present proceeding as to whether the investigation required by law had been made by the Custodian prior to such pretended determination.

6. The Court erred in holding that the statement in the demand Exhibit C of the petition, that the Custodian Garvan had determined the ownership of the property in question after investigation, precluded inquiry in the present proceeding as to whether the investigation required by law had been made by the Custodian prior to such pretended determination.

7. The Court erred in holding that the annexing of the document Exhibit B to the petition of the Custodian was equivalent to an allegation that the Custodian had determined the ownership of the property in that document described after investigation.

8. The Court erred in holding that the annexing of the document Exhibit C to the petition of the Custodian was equivalent to an allegation that the Custodian had determined the ownership of the property in that document described after investigation.

9. The Court erred in holding that an admission that the manner of deposit with this respondent of the property in question, when it was admitted that severable parts thereof were not and had not been owned by an enemy or ally

of enemy was equivalent to a determination of ownership thereof by the Custodian after investigation, and could take the place thereof.

10. The Court erred in holding that the present proceeding is merely possessory in character.

11. The Court erred in holding that the making of the determination specified in Exhibit B was not disputed.

12. The Court erred in holding that the making of the determination specified in Exhibit C was not disputed.

13. The Court erred in holding that the statement in Exhibit B that investigation of the ownership of the property was made before determination thereof adequately met the admission made in open court of the allegations concerning such determination and investigation contained in the amended answer.

14. The Court erred in holding that the statement in Exhibit C that investigation of the ownership of the property was made before determination thereof adequately met the admission made in open court of the allegations concerning such determination and investigation contained in the amended answer.

15. The Court erred in holding that the Alien Property Custodian could lawfully in this proceeding assert greater rights over the property in question in the right of Mrs. von Schierholz than Mrs. von Schierholz could lawfully have done in the absence of war, in her own right.

16. The Court erred in holding that the property of persons other than enemies is the subject of capture, when not in actual hostile use against the United States, or within a region where active hostilities are being conducted.

17. The Court erred in holding that property, several identifiable parts of which were owned by citizens or neutrals in severalty, and only a severable part by enemies, was subject to capture as a single item of property.

18. The Court erred in holding that a deposit of property, made years before the war was declared in the joint names of an enemy and a neutral, with stated power to either to withdraw it, was subject to capture, by virtue of that fact alone, as enemy property in its entirety, irrespective of the actual ownership of the several parts thereof, and of the several individual personal ownership by such neutral of a several part thereof, without prior investigation of the real ownership by the Custodian.

19. The Court erred in holding that where personal property had been deposited with a bailee, under an ante-bellum contract running to an enemy and a neutral with express power to either to withdraw the property from deposit, such fact alone after the declaration of war, irrespective of notice of the real ownership of the property by persons not enemies, justified a determination that the property was held for an enemy.

20. The Court erred in holding that on the report alone Exhibit A of the petition, the Alien

Property Custodian could justly determine that the properties in question were all held for an enemy, without other investigation.

21. The Court erred in holding that an amendment of the Trading with the Enemy Act, enacted by Congress subsequent to the making of both the demands set up in the petition, as Exhibits B and C thereof, could cure a constitutional invalidity of the Trading with the Enemy Act as it existed at the time the said demands severally were made, and validate such prior demands and pretended determinations, without a new determination and demand made by the Alien Property Custodian according to law after the passage of such amendment; and in holding that such amendment could constitutionally have such effect in spite of the provisions of the V Amendment to the United States Constitution.

22. The Court erred in holding that after the declaration of war by the United States on April 6, 1917, the Trust Company had any power or authority to deliver the property in question (other than so much thereof as was individually owned by her) to Helene von Schierholz by virtue of the terms of the agreement of deposit.

23. The Court erred in holding that the Trust Company's report showed that under the trust agreement Mrs. von Schierholz at any time after April 6, 1917, had a right to demand of the Trust Company that the moneys or securities in question or any thereof be turned over to her, other than such as were her individual several property.

24. The Court erred in holding that a determination of ownership of property by the Custodian, made without evidence to support it, with notice that it was contrary to the real ownership, with notice where exact evidence of the ownership could be obtained, and made without inquiry and without investigation of the real ownership, and in fraud of the rights of the real owner, prevents any resistance to or questioning of such determination in a court of equity by such owner, or his bailee in possession of the property, when the Custodian appeals to such a court for its aid in securing delivery of the property to him.

25. The Court erred in holding that a Court of Equity should order property turned over to the Alien Property Custodian that he on the conceded facts had no lawful right to hold.

26. The Court erred in holding that a Court of Equity should order the property in question, or any thereof, turned over to the Alien Property Custodian as the property of Mrs. von Schierholz, when he was by law required to return to her any property of hers seized by him, even without prior application by her, under and by virtue of the provisions of Section 9 of the Trading with the Enemy Act, Subdivisions b)3 and b)8 as amended by the Acts of Congress of June 5, 1920 and February 27th, 1921, she having admittedly been born a citizen of the United States, and having lost her citizenship solely by her marriage to a German subject prior to 1914, and having derived whatever rights of ownership she had in the property from her father, an American citizen, and having acquired whatever rights or

powers or interests she had therein long prior to August 1st, 1914.

27. The Court erred in refusing to consider any of the objections specified in and by the amended answer of the Commercial Trust Company of New Jersey other than those mentioned in its opinion.

28. The Court erred in refusing to find that at the time of each of the demands set forth in the petition as Exhibits B and C thereof respectively the provisions of Section 7 of the Trading with the Enemy Act were unconstitutional and invalid so far as they authorized the seizure by the Custodian of property of American citizens not resident in any Judicial District of the United States and not enemies, or of neutrals not resident within any judicial district of the United States, such as Charles J. Ahrenfeldt and Frederick Wesche were respectively admitted to be.

29. The Court erred in refusing to hold the demands set forth in the petition as Exhibit B thereof void, as not constituting due process of law, as to the separate property of Wesche and of Ahrenfeldt.

30. The Court erred in refusing to hold the demands set forth in the petition as Exhibit C thereof void, as not constituting due process of law, as to the separate property of Wesche and of Ahrenfeldt.

30a. The Court erred in failing to hold the provisions of the Trading with the Enemy Act, authorizing seizure by the Alien Property Custodian of money or property not belonging to

enemies or allies of enemies and aid of the Courts in securing delivery of such property to him, unconstitutional in the absence of provision for payment of either interest or damages for the period of detention of such property before return.

31. The Court erred in holding that amendment of the Trading with the Enemy Act in July 1919 after the demands made and after any pretended determination of ownership of the property in question (whether with or without prior investigation) but prior to the institution of this equity proceeding could constitutionally cure any invalidity in those demands and pretended determinations, and bar all inquiry by a Court of Equity, upon the petition of the Custodian herein filed, into the real ownership of the property, and conclusively require and authorize award of the posession of the property in question to the Alien Property Custodian on the petition herein, which contains no allegation of any determination of the ownership by the Alien Property Custodian subsequent to the enactment of such amendment, and especially when the Alien Property Custodian admitted in open Court upon the hearing that all the allegations of the amended answer as to the ownership of the property were true.

32. The Court erred in holding that the Trust Company would be fully protected on a compliance with the Custodian's demands, Exhibits B and C of the original petition herein.

33. The Court erred in holding that the question whether Wesche or any other person other than Mrs. von Schierholz has any title or interest in these moneys or securities can be raised only

by filing a claim and instituting proceedings as provided by Section 9 of the Trading with the Enemy Act.

34. The Court erred in holding that a Court of Equity cannot, in a proceeding like the present, consider the rights of those against whom relief is sought as a condition of granting relief to the petititoner.

35. The Court erred in holding that a Court of Equity can entertain a purely possessory proceeding without regard to the equities and rights of the parties before it.

36. The Court erred in holding that the Alien Property Custodian did not, by applying to a Court of Equity for relief, waive the right to obtain possessory award otherwise than upon equitable considerations and conditions.

37. The Court erred in failing to hold that the admission on the record of the truth of the allegations of the amended answer as to the ownership of the property therein mentioned was the first determination of the ownership thereof made by any Enemy Property Custodian after investigation.

38. The Court erred in failing to hold that the admission by the Alien Property Custodian made in open court that the property in question all was and had been owned as stated in the amended answer herein, was a determination by the Alien Property Custodian, made after investigation, which superseded all prior pretended determinations by the Custodians or either of them.

39. The Court erred in holding that the petitioner is entitled to relief from this equity court without meeting the requirements of equity as to doing equity.

40. The Court erred in holding that it would direct a delivery to the Custodian as successor to the right of Mrs. von Schierholz, which it would have been a breach of trust for her to demand.

41. The Court erred in failing to hold that the petition (by petitioning in equity and proceeding by order that the respondent show cause if any there be why the property should not be turned over and assigned to the Custodian, and by omitting from his petition any allegations that he had, after investigation thereof, determined the ownership of the property in question) had sought a determination by the Court of the ownership of the property after its hearing the evidence concerning such ownership, and had given to the respondent the right to present the evidence of real ownership and to have a determination by the Court accordingly.

42. The Court erred in holding that the relief given by it to the Alien Property Custodian was not in conflict with the provisions of the V Amendment to the constitution providing that no person shall be deprived of property without due process of law.

43. The Court erred in holding that the Trading with the Enemy act, in so far as it authorized seizure of private property not in use in hostility to the United States and not within

any area of actual hostilities, belonging to persons not enemies of the United States, but who did not reside in any judicial district of the United States, was prior to July 11th, 1919, constitutional and valid.

44. The Court erred in holding that it would give its assistance to the Alien Property Custodian by requiring any property to be turned over to him as the property of Mrs. von Schierholz at a time when surrender to her by him, even without prior application by her, of all property belonging to her, was provided for by law.

45. The Court erred in failing to hold that the petitioner had not alleged that any determination of the ownership of the property had been made by either Alien Property Custodian after investigation.

46. The Court erred in holding the petition sufficient to entitle the petitioner to relief otherwise than in accordance with the actual ownership of the property, as alleged in the amended answer and admitted on the hearing, when the petition contained no allegation that either Custodian had, after investigation, determined the ownership to be otherwise.

47. The Court erred in holding that the owners of parts of the property in question who were not enemies, Mr. Ahrenfeldt and Mr. Wesche could be deprived of the possession of their property without due process of law.

48. The Court erred in holding that the demand of the Alien Property Custodian Palmer,

Exhibit B of the original petition constituted due process of law.

49. The Court erred in holding that the demand of the Alien Property Custodian Garvan, Exhibit C of the original petition, constituted due process of law.

50. The Court erred in holding that a purely possessory proceeding could be maintained by the Alien Property Custodian under the provisions of the Trading with the Enemy Act and the amendments thereof to obtain possession of property not actually belonging to an enemy or ally of enemy and not in use in hostility to the United States in the absence of an actual determination (after investigation) by the custodian, authorized by law at the time it was made, of the ownership of such property, on the ground that the Custodian might have made such a determination on the papers submitted to him.

51. The Court erred in holding that the Custodian could dispense with the duty of investigation, before determination by him of ownership of property under the provisions of the Trading with the Enemy Act, and in holding that the Trading with the Enemy Act so construed was constitutional in so far as it authorized capture of property not owned by an enemy or ally of enemy and not in actual hostile use against the United States or within a region where hostilities were being actively conducted, and that it was not when so construed, in such cases in conflict with the provisions of either the IV or V Amendments to the United States Constitution.

52. The Court erred in holding that a Court of Equity was bound to exercise its special powers in favor of the Alien Property Custodian without regard to the real and equitable rights of this respondent and those whose rights it here represented, as established before it.

53. The Court erred in holding constitutional and valid the provisions of the Trading with the Enemy Act which authorize seizure by the Custodian of private property belonging to persons not enemies or allies of enemies and which was not in actual military use against the United States or within any area of actual hostilities.

54. The Court erred in directing delivery to the Alien Property Custodian of any property admittedly belonging at all times after January 1st, 1914, to Frederick Wesche, who was admittedly never an enemy.

55. The Court erred in directing delivery to the Alien Property Custodian of any property admittedly belonging at all times after January 1st, 1914, to Charles J. Ahrenfeldt, who was admittedly never an enemy.

56. The Court erred in directing delivery to the Alien Property Custodian in this proceeding of any property which was admittedly not the property of Helene J. von Schierholz and had not been.

57. The Court erred in holding that the demand Exhibit B of the petition was a lawful exercise of the right of capture under Clause 11 of

Section 8 of Article I of the Constitution of the United States.

58. The Court erred in holding that the demand Exhibit C of the petition was a lawful exercise of the right of capture under Clause 11 of Section 8 of Article I of the Constitution of the United States.

59. The Court erred in holding that the provisions of Section 7 of the Trading with the Enemy Act, prior to the amendment of July 11th, 1919, were, so far as they authorized the seizure or capture of property belonging to persons not enemies or allies of enemies of the United States and not resident within any judicial district of the United States, a valid exercise of the power "to make rules concerning captures on land and water" conferred by Clause 11 of Section 8 of Article I of the Constitution of the United States, and not in conflict with the prohibitions contained in the IV and V Amendments to the Constitution of the United States.

60. The Court erred in holding that the Act of Congress of July 11th, 1919, could constitutionally (and in disregard of the V Amendment of the Constitution of the United States) operate, retroactively, to validate provisions of the Trading with the Enemy Act of October 6th, 1917, unconstitutional when adopted, as of a time prior to the enactment of such amendment and to validate acts attempted to be done under such unconstitutional provisions prior to the enactment of such Act of July 11th, 1919.

61. The Court erred in holding that the right of capture, in the case of property owned in severalty, part by one not an enemy or ally of enemy of the United States, and part by an enemy, could extend beyond the part or share belonging to the enemy.

62. The Court erred in holding the Trading with the Enemy Act constitutional in so far as it permitted capture of property on land not belonging to an enemy or ally of enemy, and not in use against the United States, and not within any region in which hostilities were being actively conducted.

63. The Court erred in ruling that after April 6th, 1917, under the trust agreement either Mrs. von Schierholz or Mr. Wesche could demand the possession of the properties therein covered.

64. The Court erred in holding that it was the duty of the Trust Company to comply with the demands of the Alien Property Custodian and turn over all the property demanded to him.

65. The Court erred in holding that the question of other persons' ownership or interest in the properties demanded was irrelevant in this proceeding.

66. The Court erred in holding that the questions arising out of the various rights in and to the property can be raised only after the demands of the Alien Property Custodian have been complied with, and by instituting proceedings authorized by Section 9 of the Trading with the Enemy Act as amended.

67. The Court erred in awarding custody of the property or any thereof as the property of Helene von Schierholz to the Alien Property Custodian after the enactment of the Act of Congress of February 27th, 1921, amending the Trading with the Enemy Act.

68. The Court erred in holding that, after the passage of the joint resolution of Congress declaring the state of war between the Imperial German Government and the United States of America at an end and its approval and signature by the President of the United States on July 2nd, 1921, the Alien Property Custodian had any power, right or authority to reduce to his possession as such Custodian by virtue of the Trading with the Enemy Act and any amendments thereof, any property previously demanded by him as that of Germans, but not actually previously delivered into his possession as such Custodian, other than property actually belonging to the Imperial German Government, or its successor or successors or to German Nationals, who had been enemies or allies of enemies.

69. The Court erred in holding that after the signature and ratification of the treaty with Germany of date August 25th, 1921, and the exchange of ratifications thereof between the two governments, the Alien Property Custodian had any power, right or authority to reduce to his possession as such Custodian, by virtue of the Trading with the Enemy Act and any amendments thereof, any property previously demanded by him as that of Germans, but not actually previously delivered into his possession as such

Custodian, other than property actually belonging to the Imperial German Government, its successor or successors, or to German Nationals who had been enemies or allies of enemies.

70. The Court erred in failing to hold that after the passage of the joint resolution of Congress declaring the State of War between the Imperial German Government and the United States of America at an end and its approval and signature by the President of the United States on July 2nd, 1921, and the proclamation of peace by the President of the United States, and the signature and ratification of the treaty of peace between the United States and Germany of date August 25th, 1921, and the exchange of ratifications of such treaty, the Alien Property Custodian could not, by virtue of determination of enemy ownership of property by him and demand thereof accordingly, maintain any possessory proceeding by virtue of the Trading with the Enemy Act, and the amendments thereof, to reduce to his possession as Alien Property Custodian any property, so previously demanded by him as property of German enemies of the United States, unless such property had actually belonged either to the Imperial German Government, or its successor or successors, or to German Nationals, who had been enemies or allies of enemies.

71. The Court erred in failing to hold that upon the termination of the war all right of capture under the provisions of the Trading with the Enemy Act and all right of completing capture attempted by demand of property but not theretofore completed by actual reduction of the property to possession by the Custodian ceased and determined, save and except only as to such

property as was specifically excepted by the terms of the peace resolution of July 2nd, 1921, and by those of the treaty of peace with Germany of August 25th, 1921, namely, all property of the Imperial German Government, or its successor or successors, and of all German Nationals which had been the subject of a demand, and all property of the Imperial and Royal Austro-Hungarian government or its successor or successors and of all Austro-Hungarian Nationals, which had been the subject of such demand; and in failing to hold that, it appearing that part of the property herein sought to be recovered was not of such excepted character, no possession could be herein awarded to the Custodian of such property which did not and had not belonged to said Governments or any of them or to German or Austro-Hungarian Nationals.

72. The Court erred in refusing to hold that the amendment of the Trading with the Enemy Act by the Act of July 11th, 1919 (as construed by it, as validating determinations and demands made by the Custodian prior to the enactment of such amendment as to which the provisions of the Trading with the Enemy Act as previously existent were unconstitutional) was invalid and unconstitutional, as in conflict respectively with the provisions of the Constitution of the United States, to wit, those of the Fifth Amendment of the Constitution of the United States, forbidding that any person be deprived of property without due process of law, and those forbidding the taking of private property for public use without just compensation and in conflict with the pro-

visions of the Fourth Amendment to the Constitution of the United States forbidding unreasonable seizures.

73. The Court erred in holding that this proceeding was a possessory one, when the demands Exhibits A and B of the original petition were both void because made under a statute which was unconstitutional at the time they were made, as to the owners of parts of the property involved, to wit, Frederick Wesche a neutral resident at all times since 1914 in Switzerland and Charles J. Ahrenfeldt, an American citizen resident, at the times when said demands were each made and since, outside of the United States, in London, England and in Switzerland, as providing for seizure of property of persons not enemies without due process of law.

74. The Court erred in holding that a capture by the Custodian was completely effected of the property here in question before the exchange of ratifications of the treaty of peace, by the demands shown and the institution of this proceeding, without the actual reduction to his possession of the property or any part thereof.

75. The Court erred in holding that the stipulation in the treaty of August 25th, 1921, between the United States and Germany according to the United States the benefit of the provision in the joint resolution of Congress of July 2, 1921, that all property of all German Nationals which had been the subject of a demand by the United States of America or of any of its officers, agents or employees should be retained by the United

States of America and no disposition thereof made except as specifically provided by law, was (as construed by the Court as applicable to property of individual German Nationals, which had been merely made the subject of a demand or demands by the Alien Property Custodian without actual reduction to possession or physical capture) constitutional and valid and not within the prohibitions of the V Amendment to the Constitution of the United States.

76. The Court erred in holding that the Joint Resolution of Congress of July 2d, 1921, in so far as it authorized completion of uncompleted captures of private property after the conclusion of peace and the exchange of ratifications of the treaty of August 25th, 1921, was constitutional and valid and not within the provisions of the V Amendment to the Constitution of the United States forbidding that any person shall be deprived of his property without due process of law, and forbidding the taking of private property for public use without just compensation.

77. The Court erred in holding that the Trading with the Enemy Act, and the Amendments thereof, the Joint Resolution of Congress of July 2d, 1921, the Proclamation of Peace by the President of the United States, and the treaty of August 25th, 1921, and the exchange of ratifications thereof, all and severally, were constitutional and not within the prohibitions of the V Amendment to the Constitution of the United States forbidding the taking of private property for public use without just compensation, and forbidding that any person should be deprived of his property

without due process of law, as the same were construed by the Court as authorizing completion (as against individual owners), after the conclusion of peace, of captures by the Custodian of private property individually owned, not previously reduced to actual possession by him.

78. The Court erred in assisting a capture of individually owned private property by the Custodian after the conclusion of peace.

79. The Court erred in assisting a capture of individual private property, belonging to an American citizen, by the Custodian, after the conclusion of peace.

80. The Court erred in holding that after the conclusion of the treaty of peace the Alien Property Custodian was authorized to prosecute any proceeding for the purpose of reducing to his possession property not actually so reduced to possession prior to the conclusion of peace.

81. The Court erred in holding that it had any jurisdiction to entertain a purely possessory proceeding by the Custodian after the conclusion of peace.

82. The Court erred in not denying the petition of the Custodian.

83. The Court erred in failing to hold that the provisions of the Trading with the Enemy Act authorizing purely possessory proceedings by the Alien Property Custodian to recover possession of property which he had required to be

delivered to him as enemy property, had become unconstitutional with the termination of the war.

84. The Circuit Court of Appeals erred in stating that the one question brought before it was whether the appellant was right in thinking that the Alien Property Custodian had no right to the property because the neutral had power upon his sole order to withdraw the whole property, or the Alien Property Custodian was right in thinking he had a right to it because the alien enemy had like power upon her sole order to withdraw the whole property and acquire its possession.

85. The Circuit Court of Appeals erred in holding that the appellant there maintained that as a matter of fact there was no investigation or determination by the Alien Property Custodian that Mrs. von Schierholz was an alien enemy, whereas what the appellant maintained with regard to lack of investigation and determination was that there was no investigation and determination by the Alien Property Custodian after investigation that Mrs. von Schierholz was the owner of the property.

86. The Circuit Court of Appeals erred in holding that the provisions of the Trading with the Enemy Act as originally enacted and as amended in 1918 for a return of the property in case of mistake fully met the due process of law guarantee of the Constitution.

87. The Circuit Court of Appeals erred in holding that the present proceeding in equity was a purely possessory proceeding.

88. The Circuit Court of Appeals erred in finding that there was no irregular or insufficient action on the part of the Alien Property Custodian in the investigation and determination of the ownership of the property.

89. The Circuit Court of Appeals erred in holding that the property in question was under the sole control of the Alien enemy as to its withdrawal, possession and disposition.

90. The Circuit Court of Appeals erred in holding that the property in question being held for the joint account of a neutral and an alien enemy and being under the sole control of an alien enemy as to its withdrawal, possession and disposition, it was properly regarded as enemy owned property liable to seizure by the Alien Property Custodian.

91. The Circuit Court of Appeals erred in holding that neither for itself as Trustee nor for either cestui que trust was the Trust Company justified in withholding delivery of the property under the Act.

92. The Circuit Court of Appeals erred in holding that the Act as passed and amended had not been repealed or otherwise affected by the armistice, the peace resolution of Congress or the treaty with Germany.

93. The Circuit Court of Appeals erred in holding that while hostilities had ceased and peace was re-established by either the armistice, the peace resolution of Congress or the treaty with

Germany, the Trading with the Enemy Act by reason of not containing self-limiting terms and not being expressly repealed remains the law.

94. The Circuit Court of Appeals erred in holding that in face of the provisions of the IV Amendment to the Constitution of the United States an order could be made by the Court in such proceeding directing delivery of property to the Alien Property Custodian as to which no probable cause was shown to the Court supported by oath or affirmation to believe it enemy property.

95. The Circuit Court of Appeals erred in affirming the decree of the District Court.

Brief of the Argument.

The questions presented by this appeal are argued at length in the brief presented in the associated appeal of United States Trust Company of New York as Ancillary Administrator of Frederick Wesche, deceased, October Term, 1922, No. 292. The argument there made is adopted for the points here made, which group themselves under three heads as follows:

A. Proceedings by the Custodian under Section 17 of the Trading with the Enemy Act, even though of purely possessory character, are subject to some valid defenses.

B. The facts presented in the present case showed ample cause for refusal of the relief sought by the Custodian, especially as to the separate property of Ahrenfeldt and Wesche.

C. The previous decisions of this Court in *Central Trust Co.* vs. *Garvan* and *Stoehr* vs. *Wallace,* do not cover the questions presented by this appeal.

A.

PROCEEDINGS BY THE CUSTODIAN UNDER SECTION 17 OF THE TRADING WITH THE ENEMY ACT, EVEN OF PURELY POSSESSORY CHARACTER, ARE SUBJECT TO VALID DEFENSES.

POINT I.

The provisions for appeal in proceedings brought by the Custodian under Section 17 of the Trading With the Enemy Act necessarily imply that there may be valid defenses to any such proceedings.

Vide U. S. Trust Co. brief, Point I.

POINT II.

If purely possessory in character the Custodian's proceeding is an application for a warrant; and, under the IV Amendment, no warrant may issue but upon a showing of facts constituting probable cause, supported by oath or affirmation.

Vide U. S. Trust Co. brief, Point II.

A purely possessory proceeding is an application for a warrant.

Central Trust Co. vs. *Garvan,* 254 U. S. 554.

No Federal Court may issue a warrant or other instrument of such character for the seizure of

property but upon probable cause supported by oath or affirmation.

IV Amendment to the U. S. Constitution.

This limitation extends to the war-powers.

United States vs. *Cohen Grocery Co.*, 255 U. S. 81, 88;
Ex parte Milligan, 4 Wall. 2, 118-120;
Miller vs. *United States*, 11 Wall. 268, 317;
Tyler vs. *Defrees*, 11 Wall. 331.

The facts, supposed to constitute probable cause for seizure, must themselves be shown to the court, or officer, issuing the warrant, for their determination whether they constitute probable cause. The conclusion of the officer seeking the warrant, that there is probable cause, cannot take the place of showing the facts on oath or affirmation.

Ripper vs. *United States*, 178 Fed. 24, 26;
Veeder vs. *United States*, 252 Fed. 414, 420;
United States vs. *Veeder*, 246 U. S. 675;
United States vs. *Pitotto*, 267 Fed. 603;
United States vs. *Rykowski*, 267 Fed. 866;
24 Opinions Atty. Gen. 685, 688.

POINT III.

Unconstitutionality of the Statute, or of seizure under it, as applicable to a particular case, may be asserted as a defense.

Vide United States Trust Co. Brief, Point III.

Two of the owners being non-residents (Record, pp. 55, 70-72, 198), to whom, at the time of the demands made by the Custodian, all judicial review of seizure of their property was expressly prohibited, the attempted seizure of their property, they being neither enemies nor allies of enemies (Record, pp. 55, 70-72, 198), was without due process of law and void.

Garvan vs. *$20,000 Bonds*, 265 Fed. 477, 479;

Trading With the Enemy Act, Sec. 9, as enacted Oct. 6, 1917.

Surrender of property by this appellant in response to a void and illegal demand would have constituted no defense to subsequent demands by the owners. Such defense was necessarily pleadable.

POINT IV.

If the Custodian's determination be offered as a substitute for the constitutional requirement of "probable cause supported by oath or affirmation," it must be shown positively, under oath or affirmation, (and not by mere possible inference), that such determination has been made, and that all statutory prerequisites of such determination have been complied with.

Vide United States Trust Co. Brief, Point IV.

Reasonable prior investigation by the Custodian and his personal determination, predicated in good faith upon the results of such investigation, are essential prerequisites of the validity of a demand by the Custodian.

Central Trust Co. vs. *Garvan,* 254 U. S. 554;
Salamandra Ins. Co. vs. *Trust Co.,* 254 Fed. 852, 857;
Runkle vs. *United States,* 122 U. S., 543.

And if substitution of the Custodian's determination for a showing of facts constituting probable cause were permissible, the fact that the determination had been made pursuant to all requirements of law must needs be positively and directly shown by oath or affirmation, and not left to doubtful inference. Somewhere along the line the facts constituting probable cause must be shown, supported by oath or affirmation.

POINT V.

A constructive capture, if, for any reason, not completed by the mere demand of the Custodian, could not be completed by decree or issue of warrant by the Court, save upon a showing to it of facts constituting probable cause to believe it properly subject to capture. Nor could an incomplete capture be completed after the passage and signature of the Joint Resolution of July 2nd, 1921, declaring peace.

Vide United States Trust Co. Brief, Point V.

Stochr vs. *Wallace*, 255 U. S., 239.

POINT VI.

The requirements of the IV Amendment were not evaded by petitioning in equity.

Vide United States Trust Co. Brief, Point VI.

B.

IN THE CASE AT BAR THE FACTS SHOWN AT THE HEARING CONSTITUTED AMPLE CAUSE FOR REFUSING THE RELIEF SOUGHT BY THE CUSTODIAN, ESPECIALLY AS TO THE PROPERTY OF WESCHE AND AHRENFELDT.

POINT VII.

The Custodian failed to *allege* that he had made any requirement of delivery in accordance with the provisions of the statute.

Vide United States Trust Co. Brief, Point VII.

The Custodian by merely annexing copies of papers served, which recited investigation and determination (Record, pp. 18, 35-38), did not *allege* any determination, after investigation, of the ownership of the property.

Moyer vs. *Peabody,* 212 U. S. 78, 84;
Bell vs. *Bell,* 181 U. S., 175, 178;
Thompson vs. *Whitman,* 18 Wall. 457, 458.

POINT VIII.

The Custodian failed to *allege* probable cause to believe the property he sought to be enemy property.

Vide United States Trust Co. Brief, Point VIII.

The contract set out in the report of this appellant (Record, pp. 17-18) did not show or give reasonable cause to believe, or justify any conclusion that all this property belonged to Mrs. von Schierholz; and the further reports that Wesche was beneficially interested (Record, pp. 17, 19) and a *cestui que* trust (Record, p. 5) tended to show the contrary.

Kaufman vs. *Edwards*, 92 N. J. Eq. 554;
Kelly vs. *Beers*, 194 N. Y. 49, 55;
Matter of McKelway, 221 N. Y. 15, 19;
Matter of Buchanan, 184 A. D., 237.

On the contrary these data loudly called for the investigation, required by the statute, into the ownership, which the Custodian concededly did not make (Record, pp. 75-76, 196, 198).

Even assuming the property to be jointly owned by Wesche, a neutral, and Mrs. von Schierholz, an enemy, the property was not subject to capture as an entirety, but only the enemy's interest therein.

The Francis (Graham's Claim), 8 Cranch 348;
The Ship Francis (John Graham's Claim), 1 Gall. 618;
The Franklin, 6 Chr. Rob| 127.

POINT IX.

The Custodian failed to *show*, upon the hearing, any facts constituting probable cause to believe that the entire property belonged to Mrs. von Schierholz, but on the contrary admitted that the property was and had been owned as shown by this appellant's amended answer.

Vide United States Trust Co. Brief, Point IX.

The undisputed facts (Record, p. 198) shown on the hearing took the place of any investigation and determination by the Custodian.

Garvan vs. *$20,000 Bonds*, 265 Fed. 477, 479;
Ripper vs. *United States*, 178 Fed. 24, 26.

This applied not only to the ownership of the property (Record, pp. 56-74, 196, 198), but also to the status of Wesche, of Ahrenfeldt, of Mrs. von Schierholz, and of Mrs. von Uxküll-Gyllenband (Record, pp. 54-56, 198).

These undisputed facts showed lack of probable cause for seizure of any of the property.

POINT X.

The facts set up in the amended answer of this appellant, the truth of all of which was expressly admitted by the Custodian, were a complete defense to the Custodian's petition.

Vide United States Trust Co. Brief, Point X.

This answer and the admission of its truth showed the following defenses:

a). The Custodian had never made or attempted any investigation of the ownership of the property (Record, pp. 75-76, 196-198).

b). His pretended "determination" was squarely in conflict with the reports submitted to him by this appellant which was all the information he had secured (Record, pp. 10-29, 193-195, 196-198).

c). There was no determination by the Custodian himself (Record, pp. 47, 76-77, 198).

d). The demands of the property of Wesche and Ahrenfeldt did not constitute a completed capture thereof (Point III, *supra*).

Garvan vs. *$20,000 Bonds*, 265 Fed. 477, 479.

insert > e)

Capture was thus not completed before peace, and could not be completed by the Court after peace.

Stoehr v. *Wallace*, 255 U. S. 239.
Vide Point XIII, *infra*.

POINT XI.

The present proceeding was not a purely possessory one, such as this Court described in *Central Trust Co.* vs. *Garvan*, 254 U. S. 554, but sought investigation of the facts.

Vide United States Trust Co. Brief, Point XI.

1. A *purely* possessory proceeding cannot be maintained in equity, and this proceeding was expressly one in equity (Record, pp. 1, 3, 8).
2. The proceedings were expressly brought under Section 24 of the Judicial Code, as well as under Section 17 of the Trading With the Enemy Act (Record, pp. 7-8).
3. The petition expressly prays for the exercise of equity powers and for equitable relief (Record, p. 8).
4. The allegations of the petition are insufficient for a purely possessory proceeding. The Custodian alleged neither investigation on his part of the ownership of the property, nor determination based thereon, nor did he make allegation, or showing, of enemy ownership of all this property (Record, pp. 3-8).

Moyer vs. *Peabody*, 212 U. S. 78, 84;

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Garran vs. *$20,000 Bonds*, 265 Fed. 477, 479.

insert > e)

e). The property was not properly subject to capture; as it was not enemy property, save the separate property of the two ladies, and their property was exempt from seizure under the amendment of the act.

Vide Point XII, *infra*.

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Moyer vs. *Peabody*, 212 U. S. 78, 84;
Bell vs. *Bell*, 181 U. S. 175, 178;
Thompson vs. *Whitman*, 18 Wall. 457, 458.

Some allegations of such caracter were essential to a purely possessory proceeding.

Denver v. *Mercantile Trust Co.*, 201 Fed. 790, 810;
Richardson v. *Green*, 61 Fed. 423, 431;
Pond v. *Harwood*, 139 N. Y., 111, 120;
Dietrich v. *Fargo*, 194 N. Y. 359, 363.

And the Custodian having applied in equity the Court should have disposed of the ultimate rights instead of remitting the parties to new litigation.

Camp v. *Boyd*, 229 U. S. 530, 551-552;
Decker v. *Caskey*, 1 N. J. Eq. 427;
Williams v. *Winans*, 22 N. J. Eq. 573, 577;
Story, Equity Pleadings, Sec. 72.

And by applying in equity the Custodian had invoked such a disposition of the matter, as well as by the very form of his prayer for relief.

POINT XIII.

Neither the Joint Resolution of July 2nd, 1921, nor the Treaty with Germany ratified in November, 1921, authorized "capture" of any of this property after July 2nd, 1921.

Vide United States Trust Co. Brief, Point XIII.

The right of "capture" ceased under the Constitution upon the declaration of peace.

Stoehr vs. *Wallace*, 255 U. S. 239.

Neither Resolution nor Treaty *could* reserve or confer on this Government power to make "captures" in peace time contrary to the prohibitions of the Constitution. Germany could waive only its own rights, and, certainly, not those of neutrals or Americans.

Moreover, the property here in question was excepted from the provisions of both resolution and treaty.

C.

THE DOCTRINES ASSERTED BY THE CUSTODIAN HAVE NOT YET BEEN ESTABLISHED BY THIS COURT AND SHOULD NOT BE.

POINT XIV.

The decisions of this Court in *Central Trust Co.* vs. *Garvan*, 254 U. S. 554, and in *Stoehr* vs. *Wallace*, 255 U. S. 239, are broadly distinguishable from the case at bar.

Vide United States Trust Co. Brief, Point XVIII.

The following points here presented were not passed on in either of those cases:

1). The effect of requirement by the Custodian of delivery of property belonging to persons or allies of enemies, to whom all judicial review of a seizure was forbidden.

2). The necessity of showing facts constituting probable cause to believe the property subject to capture, under the IV Amendment.

3). The effect of the statutory provision for appeals in the very section which authorizes the Custodian to ask the assistance of the Courts.

4). The effect of an admission in open Court on the part of the Custodian that the property was not enemy property.

5). The effect of an admission in open Court on the part of the Custodian that the supposed enemy was an American born woman, who had become German by marriage years before the war, entitled under the Statute to immediate return of any property of hers involved in the proceeding.

6). The extent of the right of capture of joint property belonging to an enemy and a neutral.

POINT XV.

Upon the admitted facts at bar the decree directing conveyance of the property to the Custodian was erroneous.

In no previous case have any such conditions as those presented here been before this Court.

No probable cause was even pretended to be shown to the Court to believe that Wesche's property or Ahrenfeldt's was enemy property or rightfully subject to capture. The Custodian admitted that he had never had probable cause to believe either Wesche or Ahrenfeldt an enemy, or their separate property enemy property; and that it was not enemy property, or the property of Mrs. von Schierholz. The Custodian made no direct allegation that he or his predecessor had determined the ownership of the property after investigation, and admitted the facts which showed that the demands he had made were unconstitutional at the time when made as to Wesche's property and Ahrenfeldt's. He admitted that Mrs. von Schierholz had a status at the time

of submitting the cause to the District Court entitling her to immediate return of her own property, and that the same was true of Mrs. von Uxküll-Gyllenband.

And in the face of that situation, months after the war had been completely terminated, he demanded that a Federal Equity Court, disregarding the prohibitions of the IV Amendment, issue its warrant and decree for the conveyance of this property to him, and refuse to listen to the protestations of this appellant, that before any Federal Court can, in time of peace, issue a warrant for the delivery of property it must require some showing, supported by oath or affirmation, of probable cause for its seizure.

In this case he showed that there was no probable cause for seizure of any of the property, and that there never had been any as far as the separate property of Wesche and Ahrenfeldt was concerned.

POINT XVI.

The decree appealed from should be reversed and the petition of the Custodian dismissed on the admitted facts.

Respectfully submitted,

SELDEN BACON,
Counsel for Appellant.